

viability"), *aff'd mem.*, 141 F.3d 1153 (3d Cir. 1998). As already pointed out, however, neither the trial court nor the Third Circuit found Dentsply's rivals without alternative means of distributing their tooth products. See note 2, *supra*. Every Circuit but the Third Circuit has recognized that the availability to competitors of direct distribution and alternative distributorship options should end the antitrust inquiry. If exclusive arrangements do not result in market foreclosure, they cannot be found to cause competitive harm. Petition at 10. Nor, until the decision below, have the federal circuits understood that conclusion to be any different whether the exclusivity issue is examined under Clayton § 3 or Sherman §§ 1 and 2. Petition at 10-13.

The Third Circuit has broken ranks with this existing body of law and declared exclusive arrangements to be anticompetitive under Sherman § 2 if used "effectively" by the largest market participant, even though rivals are not foreclosed from the end-user market and it has been determined (and nowhere challenged) that there are no probable nor actual anticompetitive effects under Clayton § 3 and Sherman § 1. As indicated, the Third Circuit approach is tantamount to making exclusive dealerships in the hands of large firms *per se* unlawful, notwithstanding that they are generally regarded as having pro-competitive attributes that should be encouraged, not discouraged, so long as their effect is not to close to other competitors access to the end-users. See *Gilbarco*, 127 F.3d at 1162; *Ryko Mfg.*, 823 F.2d at 1233-35; *Roland Mach. Co.*, 749 F.2d at 395; *In re Beltone Elecs. Corp.*, 100 F.T.C. 68, 215-18 (1982).

The decision below involves an important question of antitrust law. Review by this Court is needed to resolve the Circuit Court split, reconcile the treatment of exclusive arrangements under the several antitrust provisions discussed, and clarify the analytical confusion introduced by the treatment of the issue by the Third Circuit in this case.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the Petition for Writ of Certiorari should be granted.

Dated: December 20, 2005

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF)	
AMERICA,)	
)	
Plaintiff,)	
)	Civ. No. 99-005-SLR
v.)	
)	
DENTSPLY)	
INTERNATIONAL, INC.,)	
)	
Defendant.)	

ORDER

At Wilmington this 28th day of September, 2005, having conferred with the parties;

IT IS ORDERED that:

1. Consistent with the parties' agreement to stay the injunction ordered by the Third Circuit until defendant's petition for certiorari has been acted upon by the Supreme Court:

a. Plaintiff's motion for entry of final judgment (D.I. 541) is denied, without prejudice to renew once the Supreme Court has rendered its final decision in the above referenced case.

b. Defendant's motion to stay briefing (D.I. 543) is moot.

2. The above referenced case is referred to Magistrate Judge Thyng, pursuant to 28 U.S.C. § 636(b)(1), to help the parties negotiate the terms of the final judgment, consistent with the decision of the Third Circuit.

2a

/s/ Sue L. Robinson

United States District Judge